CONGRESS SHOULD ABROGATE FEDERAL JURISDICTION OVER STATE CORPORATIONS.

THE latest Judiciary Act of Congress, March 3, 1887, gives to the Circuit Courts cognizance of suits in favor of assignees, against corporations as parties, upon their obligations passing by delivery.

Here, for the first time in our history, the word "corporation" appears in a Judiciary Act. How it happened will be seen below.

There is no authority in the Constitution for extending the judicial power of the United States to suits against corporations created by the States, unless corporations are included within the word "citizens," in the clause whereby the States, in adopting the Constitution, granted to the general government judicial power over controversies between citizens of different States, — that is to say, unless a corporation created by a State is a citizen of that State, the same as a natural person born or naturalized in the United States and residing in that State; and this every lawyer and every layman knows is not so, no matter what any court may have said to the contrary.

Before the adoption of the Constitution the States had exclusive jurisdiction over suits between private corporations of the States in all cases; and after the adoption of the Constitution the State courts possessed and exercised the same exclusive jurisdiction, except where all the members of a corporation, a party to a suit, were shown to be citizens of the State creating it, and where the opposite party was shown to be a citizen of another State.

This exclusive jurisdiction the courts of the States retained until 1844, when the Supreme Court made a construction of the Constitution which operated to deprive the State courts of this exclusive jurisdiction, and to make it concurrent with the Circuit Courts of the United States, and ultimately to make it (as it is at present) practically exclusive in the latter, under the operation of the Removal Acts.

Under the construction given by the Supreme Court to the word "citizens" during the period when that court was the strongest in

its whole history, and when its Bar was the ablest, — from 1789 to 1844, — it was undoubtingly and unanimously held that there was no jurisdiction in the Circuit Courts over corporations existing under the laws of the States, as parties to suits, except where every one of the members of the corporation was a citizen of the State creating it, and was averred to be such.[1]

Obviously, the word "citizens" in that clause of the Constitution extending the Federal judicial power to controversies between citizens of different States refers to human beings, and not to legal aggregations composed of them, no one of whom might be a citizen of the State creating the legal aggregation. We know that the existence of a corporation independent of its members is a myth, and that the rights of a corporation are in reality the rights of the persons who compose them. The Constitution of the United States does not deal with myths; and, accordingly, it was said by the great Chief Justice in the Deveaux case that the legal aggregation was certainly not a citizen, and that the jurisdiction must depend upon the rights of the members to sue; and he further said that such had been the universal understanding of the subject. Mr. Justice Johnson declared that the Deveaux case was one of the canons of the court.[2] Mr. Justice Story laid down that a corporation is not a citizen in the sense of the Constitution with respect to right of suit.[3] Some writers, indeed, say that this doctrine was inconvenient and narrow, and that the later cases reversing it are satisfactory and salutary. But these adjectives are wide of the mark. The real question is, Did the States ever grant to the general government any such jurisdiction as is seized upon in the reversing cases? And the answer to this question must be in the negative. Those cases finally settle on the doctrine that a corporation may sue or be sued as a citizen of the State creating it, upon the *presumption* that all the members are citizens of that State.[4]

If anything within the domain of legal discussion can be said to be certain, it is that there is no warrant in the Constitution for

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[1] Strawbridge *v.* Curtiss, 3 Cranch, 267; Bank *v.* Deveaux, 5 Cranch, 61; Hope Ins. Co. *v.* Boardman, 5 Cranch, 57; Sullivan *v.* Fulton Co., 6 Wheat. 450; Breithaupt *v.* Bank, 1 Pet. 238; Bank *v.* Slocomb, 14 Pet. 60; Sewing-Machine Cases, 18 Wall. 574; Shaw *v.* Quincy Co., 145 U. S. 451.

[2] Bank *v.* Planters' Bank, 9 Wheat. 911.

[3] 2 Com. Const. § 1695.

[4] O. & M. R. R. *v.* Wheeler, 1 Black. 296; Steamship Co. *v.* Tugman, 106 U. S. 121.

indulging in any such presumption, and thereby depriving the courts of the States of a jurisdiction never surrendered.

Reasons different from the above presumption were at first assigned for seizing their jurisdiction, — a consciousness of going beyond the set bounds being evident on perusal of the opinions. In the Louisville Railroad case,[1] which first made the break, a corporation is said to be an inhabitant of the State creating it, and "therefore" a citizen of that State "as much as a natural person." In Covington County *v.* Shepherd[2] it is said that the existence and domicile of the corporation are established by a State statute of which the court takes judicial notice, and that therefore an averment of the citizenship of the members is enough. But if the court would take judicial notice of the State statutes in reference to the erection of corporations, the court would see (if it did not purposely shut its eyes) that in not one of all the States do those statutes require that all the corporators shall be citizens of the State. In Covington County *v.* Shepherd the idea is repudiated that the corporation itself can be a citizen, notwithstanding it was fully and positively declared in the Louisville case. At present the averment is required to be made that the corporation is a citizen, and the Louisville case is approved on that point in 1892.[3]

But the *real* ground of the later decisions has been a determination to maintain the jurisdiction at all hazards ; and so Judge Bradley plainly says.[4] His language is, that the court "was impelled" to "get rid of the troublesome stockholder who happened to be a citizen of the same State with the opposite party, and who almost always appeared in the case." In other words, there was almost always some citizen who was tenacious of his right, under the Constitution, to have the case heard in the State court ; and the Federal court, in order to "get rid" of his sound objection, manufactured a presumption that the objector was not what he actually was, — a citizen of the same State with the opposite party!

Justices Catron, Daniel, and Campbell, three Democratic judges, declared that "this assumption of citizenship for a corporation is a mere evasion of the limits prescribed to the United States courts by the Constitution."[5]

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[1] Louisville R. R. Co. *v.* Letson, 2 How. 193.

[2] Covington Co. *v.* Shepherd, 20 How. 233.

[3] Shaw *v.* Quincy Co., 145 U. S. 451 ; So. Pac. Co. *v.* Denton, 146 U. S. 205.

[4] Removal Cases, 100 U. S. 480, *middle.*

[5] N. Ind. R. R. *v.* Mich. C. R. R., 15 How. 249.

This is unquestionably so; and the later decisions are a deliberate invasion of the rights of the States.

These States are independent political communities, possessing all the judicial power which they have not ceded to the general government by the Constitution; and by ceding power over controversies between citizens of different States, they confessedly did not cede power over controversies between corporations of different States. The States never would have consented to deprive their citizens of a resort to their own tribunals in suits concerning corporations *arising under State laws and involving no Federal question.* But this deprivation is every day's experience of the clients of a lawyer in large practice at the present time.

The States, within the limits of their powers not granted by them to the general government, are as independent of that government as that government, within its sphere, is independent of the States.[1] These questions of jurisdiction of courts are questions of power between the two (qualified) sovereignties; and by the existing doctrine the judicial power of the States over their own corporations is seized, and a jurisdiction is usurped which is admittedly not derivable from the language of the Constitution, and which is attempted to be supported by an unwarranted presumption against known facts which would oust the jurisdiction.

"Corporation" seems to have been a word to conjure with.

In all controversies disconnected from corporations, each individual having any joint or several interest on one side must be a citizen of a different State from that of which any person on the other side is a citizen.[2] And the rule is held not changed even in a suit by a joint-stock company, organized under the law of a State, and authorized by a public statute of the State to bring suit in the name of its president. Such a company is not allowed to sue, because not incorporated.[3] And yet the Circuit Courts have declared that the same reasons may be given for taking jurisdiction in the latter case as in the case of corporations, and have actually exercised the jurisdiction.[4]

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[1] Collector *v.* Day, 11 Wall. 124; Texas *v.* White, 7 Wall. 725.

[2] Bryant *v.* Rich, 106 Mass. 102; Blake *v.* McKim, 103 U. S. 339; Sewing-Machine Cases, 18 Wall. 574, 575; Smith *v.* Lyon, 133 U. S. 319.

[3] Chapman *v.* Barney, 129 U. S. 682.

[4] Imperial Co. *v.* Wyman, 38 Fed. Rep. 529; Maltz *v.* Amer. Exp. Co., 1 Flippin, 611; Fargo *v.* Louisville R., 6 Fed. Rep. 787, Gresham, J.

Congress should interfere, and abrogate the jurisdiction. It is axiomatic that the Circuit Courts can exercise no jurisdiction given by the Constitution which has not been conferred by Congress upon the Circuit Courts by statute. Plainly, what Congress has granted it can take away. And as the courts maintain that Congress, in giving jurisdiction to the Circuit Courts as to citizens of different States, has granted jurisdiction over corporations, as citizens, this jurisdiction Congress can take away, and should take away, because it was never surrendered by the States, but rests upon a mere gloss of the Supreme Court. That is a viperous gloss, saith Coke, which eats out the bowels of the text. "Glossa viperina est quæ corrodit viscera textus." [1]

The striking anomaly should no longer exist that if an individual inhabitant of any State is a member of a corporation of any State, suing or sued, he is conclusively presumed to be a citizen of that State where the corporation is organized; but if he himself sues, or is sued, it must be averred and proved that he is a citizen.

This fiction, invented by the court, is the sole foundation of that enormous mass of litigation which has so filled the Circuit and Supreme Courts as to lead recently to the establishment of the intermediate Courts of Appeal. And the reports of these latter courts already show that the bulk of their business rests upon the invented jurisdiction.

This invention was of little importance, and attracted comparatively little attention, for many years after it was made, because the number of corporations, although large, was not enormous. But now every day witnesses a great brood of new ones. Legislatures no longer make them. Every Tom, Dick, and Harry make them, to run a corner grocery. In Covington Co. *v.* Shepherd, above, the court took jurisdiction because it could judicially notice the special charter of the corporation. But now the corporation is the production of private individuals, by their mere act (which cannot be judicially noticed), assuming corporate name and powers, *ex parte*, without any supervision of a legislature.[2]

One of two things must come to pass: either the invented jurisdiction must be taken away by Act of Congress, or additional Federal courts must ultimately be established.

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[1] Case of the Marshalsea, 10 Coke, 70.

[2] Oregon Co. *v.* Oregonian Co., 130 U. S. 26; Central Co. *v.* Pullman's Co., 139 U. S. 49.

Congress should not only abrogate the law manufactured by the courts, as above stated, but should repeal that portion of the Judiciary Act of 1887,[1] mentioned at the beginning of this article, giving a certain jurisdiction, in terms, over corporations. This law is administered as recognizing corporations as parties to suits.[2]

This vicious provision is little known, and has not excited observation or comment. It should be repealed, — because it proceeds upon the unfounded presumption above stated; because it permits controversies between citizens of the same State to be brought within the grasp of the Federal courts, by assigning causes of action on corporation paper to a resident citizen of another State, thus indefinitely increasing the jurisdiction of the Federal courts; and because it makes a distinction between individual and corporation paper in favor of the corporation.

The general object of this Act was to *curtail* the jurisdiction of the Circuit Courts.[3] In view of this, How did this obnoxious provision as to corporation paper creep in? In this way: The bill was introduced by a Democrat into a Democratic House; but when it went to the Republican Senate (the stronghold of corporate influence), this provision was there inserted by an amendment excepting corporations from the denial of jurisdiction over suits by assignees unless the assignor could have sued.[4]

Under this Senate amendment the large and increasing classes of State corporations, issuing great numbers of securities, negotiable by delivery, are now under the cognizance of the Circuit Courts whenever those securities are in the hands of any subsequent holders, although the transfer may have been solely to enable the holders to get into those courts, and although the transferor could not have sued there, and although jurisdiction over these corporations has never been surrendered by the States.

By § 11 of the original Judiciary Act of 1789 the policy was established of preventing the making of assignments for the pur-

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[1] 1 Supp't R. S. U. S., 2d ed., 612. Same Act, *appendix*, 120 U. S. 786 (in parallel columns with the previous Judiciary Act).

[2] Newgass *v.* N. O., 33 Fed. Rep. 196; Rollins *v.* Chaffee Co., 34 Fed. Rep. 91; Wilson *v.* Knox Co., 43 Fed. Rep. 482; Bank *v.* Barling, 46 Fed. Rep. 358; s. c. (U. S. App.), 50 Fed. Rep. 260; Ambler *v.* Eppinger, 137 U. S. 482.

[3] Smith *v.* Lyon, 133 U. S. 320; *Re* Penn. Co., 137 U. S. 434; Fisk *v.* Henarie, 142 U. S. 467; Shaw *v.* Quincy Co., 145 U. S. 449.

[4] 18 Cong. Rec. 646.

pose of giving jurisdiction to the court, — foreign bills only being excepted, in order that their circulation might not be impeded. It was subsequently held that this section, preventing suits by assignees, did not apply to holders of paper payable to bearer and executed by an individual.[1] As an outgrowth of this doctrine, or "superfœtation" (to use a phrase of Caleb Cushing's), the section was then held not to apply to holders of such paper when executed by a corporation.[2] Now comes the Judiciary Act of 1887; and for the purpose of curtailing the jurisdiction, partially abrogates the exemption from the restriction of suit as created by these decisions. But, departing from the policy of curtailment, the Act expressly authorizes suits by transferees of corporation paper. And this although the whole basis of the previous judicial ruling as to corporations was the previous judicial ruling as to individuals. Obviously the words, "if such instrument be payable to bearer and be not made by any corporation," are an excrescence on the face of the Act of 1887, at war with the whole purpose and policy of the Act, and should be eliminated by an amending Act.

It is to be hoped that the present Congress, Democratic in all its branches, will enact that the Circuit Courts shall not take jurisdiction of controversies between corporations created by the States in like manner as they may by law take jurisdiction of controversies between citizens of such States.

If Congress will not interfere, the question should be made an issue in selecting a new House, and should be agitated before the people.

The State courts, in case of such enactment, would resume their original and rightful exclusive jurisdiction, of which they have been deprived by the usurpation of the Federal courts.

The State courts are not distant from the door of any suitor. But a corporation, composed perhaps of his own neighbors and fellow-citizens (who have signed articles under the law of another State), may summon him from his home court, hundreds and even thousands of miles, into the Federal tribunals, when all the real parties, and all the witnesses, and the subject-matter of the suit, may be located at the place of his home State court. It is really a wonder that the States have submitted to the oppression and hardship undergone by their citizens in such cases.

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[1] Bullard *v.* Bell, 1 Mason, 243.

[2] White *v.* V. & M. Co., 21 How. 575.

"Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and laws confer."[1]

But the Supreme Court will adhere to its present rulings unless it is enlarged by the addition of judges who will repudiate the rulings. Enlargement is not desirable, and the remedy is with Congress.

The welfare of the Federal courts themselves demands the non-exercise of jurisdiction over State corporations. There would have been no need of the establishment of the appellate courts, had it not been for the usurped jurisdiction. But if there shall be no abrogation of it, additional Federal courts will be needed.

The Federal courts are of inestimable value to the country so long as they do not overstep their ordained limits. The highest court is the guardian of the Constitution; but here, as in some other well-known instances, the Constitution "is wounded in the house of its friends."

The jurisdiction of the State courts embraces all persons and things the subjects of judicial cognizance, except such as by the express terms of the Constitution and an Act of Congress are placed within the exclusive jurisdiction of the courts of the United States.

"To the decision of an underlying question of constitutional law no . . . finality attaches. *To endure, it must be right.* . . . An Act of the Legislature at variance with the Constitution is pronounced void; an opinion of the Supreme Court is equally so."[2]

The debates in the State conventions called to adopt the Constitution show that the principal objection to it concerned the Federal judicial power, as being too indefinite; and it was argued that the State judiciaries would be interfered with. So it has proved in respect to the State courts being deprived of their exclusive jurisdiction over corporations of the States as parties to suits.

Alfred Russell.

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[1] *Ex parte* McCardle, 7 Wall. 515.

[2] Bancroft, Works, iv. 349.